HARVARD LAW REVIEW

Published monthly, during the Academic Year, by Harvard Law Students

SUBSCRIPTION PRICE, $2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER

RECOVERY UNDER WORKMEN'S COMPENSATION ACTS WHERE PREVIOUS ILLNESS CONTRIBUTED TO THE INJURY. — Workmen's compensation legislation has not so completely done away with litigation as some of its proponents once predicted it would. There are certain problems of frequent recurrence that furnish the courts a fruitful source of trouble. Two of these are raised again by recent cases. One case holds that a person suffering from heart disease, which has become suddenly more acute as a result of ordinary work, can recover the statutory payments. *In re Madden*, 111 N. E. 379 (Mass.). Another holds that a hack driver who falls off his hack in a fit of dizziness induced by causes peculiar to himself can recover for the injury resulting.[1] *Carroll* v. *What Cheer Stables Co.*, 96 Atl. 208 (R. I.).

It is the fashion to preface the investigation of a problem under a work-

[1] This does not state the case quite accurately. There was evidence, relied on by the court, which seemed to show that the fall was partly due to sudden lurching of the hack. But this evidence was rather slight (see the opinion of Vincent, J., dissenting, at 96 Atl. 208, 212), and the court below had found that the fall was "probably due to dizziness or unconsciousness induced by a disease from which he was suffering." It is believed therefore that the finding in favor of the workman involves necessarily the proposition stated. That the court was prepared to go as far as this is further indicated by a long quotation, apparently approved, from Wicks *v.* Dowell & Co., Ltd., [1905] 2 K. B. 225, a case standing flatly for this proposition. For other such cases, see Frith *v.* Owners of S. S. Louisianian, [1912] 2 K. B. 155; Owners of S. S. Swansea Vale *v.* Rice, [1912] A. C. 238; Butler *v.* Burton on Trent Union, 5 B. W. C. C. 355; Milliken's Case, 216 Mass. 293, 103 N. E. 898; Claim of Clements, Op. Sol. Dep. Com. & Lab. 190. For cases similar to the first principal case, see Ismay, Imbrie & Co. *v.* Williamson, [1908] A. C. 437; Dotzauer *v.* Strand Palace Hotel Co., 3 B. W. C. C. 387;

men's compensation act by a discussion of the purpose and philosophy of those acts generally. That is a subject that has now lost much of its fresh interest. We may take it as established that the purpose of the acts is to remedy a situation thought to be unjust to workingmen, to enable them when injured to live without the aid of charity and to keep their families at home, to do away with a peculiarly wasteful sort of litigation, and to promote peace and good feeling in the industries; that the compensation or insurance payments are awarded, not for a wrong done, but for injury as such; and that they are to be regarded, from the employer's standpoint, as costs of operation.[2] The industry is now to bear the cost of broken men, as well as that of broken wheels and pulleys. But when a wheel of bad quality is broken, the industry can recover for the loss from the man who furnished it the wheel; there is no warranty of the quality of men. Must the industry then pay when the man is broken in it partly by reason of his own infirmity? Apparently it must. "Personal injury"[3] is the act's criterion. This does not mean every injury to an interest of personality:[4] damage to the structure of the body is all that is intended.[5] But when a body which was able to work suffers a change and ceases to be able, such damage has occurred. If then the change can be attributed to the work, the act inquires no farther. The loss of earning power is just as real, if not as great,[6] as when the man

O'Hara *v.* Hayes, 44 Ir. L. T. R. 71, 3 B. W. C. C. 586; Clover, Clayton & Co., Ltd. *v.* Hughes, [1910] A. C. 242; Borland *v.* Watson, Gow & Co., Ltd., 49 Sc. L. R. 10, 5 B. W. C. C. 514; Brightman's Case, 220 Mass. 17, 107 N. E. 527. And see generally an article by P. Tecumseh Sherman, in 64 PA. L. REV. 417 (March, 1916).

[2] This has become the usual statement. The question has been discussed with frequency in most of the legal, economic, and popular periodicals since 1908, with some scatterings before. Especially instructive are some of the provisions of the acts themselves. See the "Declaration of Police Power" in the insurance act of Washington (LAWS, 1911, ch. 74, § 1), the provision of the New Jersey act regarding commutation of the payments (PUB. LAWS, 1913, ch. 174, § 6), and the first section of the act of Oregon (GEN. LAWS, 1913, ch. 112, § 1).

[3] This is the standard phrase. Some acts require only an "injury." See ILL. LAWS, 1913, p. 338, § 1; NEB. R. S. 1913, § 3650; N. H. LAWS, 1911, ch. 163, § 3. It is conceived the meaning is the same. There is frequently added, following the English acts of 1897 and 1906, a requirement that the injury shall be "by accident" or "accidental." This phrase was present in the act under which the second of the two principal cases was decided (R. I. PUB. LAWS, 1912, ch. 831, art. 2, § 1); it was not present in the first (MASS. ACTS, 1911, ch. 751, part 2, § 1). In the first case it might have made a difference, but very likely not. See Clover, Clayton & Co., Ltd. *v.* Hughes, [1910] A. C. 242. The phrase raises questions which we need not here consider. See Professor Bohlen's article, "The Drafting of Workmen's Compensation Acts," in 25 HARV. L. REV. 328, 338.

[4] See the opinion in the principal Massachusetts case, 111 N. E. 379, 381.

[5] This does not mean that the physiological damage is all that is considered in fixing the amount of compensation. Loss of earning power and other factors are frequently ordered to be taken in. But no liability exists at all until the physiological damage can be shown.

[6] In the principal cases it was also as great, for the employees' failings were apparently not known, and they were getting ordinary wages. In such a case the question will arise whether the employer should pay for all of the loss actually suffered, when it came partly from the previous condition. In perhaps the majority of cases this will not arise, for the employee's weakness will be known, and he will be receiving smaller wages on account of it. And when it does arise, the hardship on the employer, if it is one, seems to be one for which provision is not made. Surely as the acts now stand a court would not be justified in reading in a clause apportioning the loss. See the principal Massachusetts case, 111 N. E. 379, 382.

was strong; the danger of pauperism just as serious. If this means a dead loss for the industry, then that is a loss which the consumers of its product ought to bear. The protection of the act extends to anyone able-bodied enough to be employed in one of the trades covered.[7]

But as said before, the injury for which recovery is sought must be one which can be attributed to the work. The acts do not create a general system of debility insurance at the expense of the employer. The injury for which compensation may be had must be one "arising out of and in the course of the employment." [8] For our present purposes the first branch of the definition is the important one. The injury must arise out of the employment. That rather vague phrase has been taken to mean that the injury must be caused by an agency, force, or situation for the existence of which the employment is responsible. The harm must be caused by the employment.[9] So our question becomes the ever-recurring question of causation.

Causation in a question under a workmen's compensation act is no different from what it is in any other legal situation. If in other relations we must look for a particular kind of "legal cause," then that is the kind of cause that we must look for here. For the reason that the law refuses to investigate all the causes of the results it deprecates is simply one of practical necessity.[10] Accurate investigation of all the antecedents of a happening takes too much time; other suitors must be served.[11] These reasons are as valid in workmen's compensation cases as in any other.

It is now pretty commonly admitted that when a force in fact directly produces an effect, the effect is always proximate: [12] that antecedent of

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[7] See the cases cited as under the principal Massachusetts case in note 1, *supra*, especially Clover, Clayton & Co., Ltd. *v.* Hughes, [1910] A. C. 242; Ismay, Imbrie & Co. *v.* Williamson, [1908] A. C. 437; and the principal Massachusetts case itself, 111 N. E. 379, 382. On reasoning very analogous to this it has been held that where a workman having one hand loses that one, he may recover as for "total disability." Schwab *v.* Emporium Forestry Co., 153 N. Y. Supp. 234. *Contra*, Weaver *v.* Maxwell Motor Co., 152 N. W. 993 (Mich.). See 29 HARV. L. REV. 104.

[8] This language, taken from the English acts, is used in a majority of the statutes so far enacted in this country. In others it is required only that the injury arise "in the course of the employment." See, for instance, OHIO LAWS, 1913, p. 82. Under such statutes the work need not have caused the injury for which recovery is sought, and the principal Rhode Island case would not need much discussion. Claim of Clements, Op. Sol. Dep. Com. & Lab. 190.

[9] See Fitzgerald *v.* Clarke, [1908] 2 K. B. 796, 799; McNicoll's Case, 215 Mass. 497, 498, 102 N. E. 697. The cases are full of similar remarks, and it is more frequently assumed than stated.

[10] The other reason often given, that it is fair to hold a man only for consequences which he might by diligence have foreseen as likely to follow from his conduct, is probably exploded. Its application to cases where liability was based on something else than negligence was always very doubtful. See Malone *v.* Cayser, Irvine & Co., [1908] Sess. Cas. 479, 481; Milwaukee *v.* Industrial Comm., 160 Wis. 238, 245, 151 N. W. 247, 248, and other cases noticed by Judge Smith in 25 HARV. L. REV. 223, 236. But its chief trouble is that the rule of non-liability for improbable results, which follows from it necessarily, is pretty much discredited. See authorities cited in notes 13 and 14, *infra*.

[11] Lord Bacon said this long ago: "It were infinite for the law to judge the causes of causes, and their impulsions one of another." MAXIMS, Reg. 1.

[12] "Proximate" used of a cause, is used to mean simply a cause which the law will take into consideration in fixing liability. Of an effect, it is used to mean simply an effect which the law will ascribe to the cause in question, and consider the result of it.

a happening which gives the immediate motive power for its production strikes the intelligence at once and is comparatively sure and easy of investigation. The fact that the effect is unexpected and unusual will not render its causation by the force remote.[13] The same is true when the material on which the force operates and in which it produces its effect is particularly predetermined by weakness or other peculiarity of structure to receive the effect which is produced.[14] This really disposes of the first of the two principal cases. Of course the work, and not merely the previous disease, must cause the injury, and whether it did or not may be a peculiarly difficult question of fact; but when it was found, as it was here, that the work which the employee was doing "so aggravated and accelerated a weak heart condition as to incapacitate her for work," the investigation is concluded.[15]

The other case is harder. The fall there cannot be traced directly to a push for which the employment is responsible,[16] for it was the driver's dizziness that threw him from the hack, and his employment did not make him dizzy. But the employment put him in a place where if he happened to be dizzy he would be more seriously hurt than if he were dizzy on the ground. Is this chance of extra harm enough to justify the statement that the employment caused the injury? The answer to this question will depend on what we mean precisely by "injury." If the injury to which causation must be traced is the contact of the plaintiff's body with the ground, we must say that the employment was not even a necessary antecedent of the injury, for he would have struck the ground just as certainly if he had been dizzy anywhere, except in bed. But if the injury to which causation must be traced is the plaintiff's broken rib, the employment comes into the direct and active causal sequence, for it was the potential energy of his position on the hack which, translated into kinetic energy during his passage to the ground, was the force that broke his rib. It is believed that the second possibility is preferable. Workmen's compensation looks not at what the defendant did, but at what the plaintiff suffered; it is the actual change in the condition of the claimant's body that founds the liability. That then ought to be the point of departure for all purposes; it is to that that causation should be traced.

DOES EXECUTION BY ONE JUDGMENT CREDITOR GIVE A PREFERENCE OVER EQUAL JUDGMENT LIENS? — Judgment liens were unknown at common law [1] and, though very general to-day, they are based entirely

[13] Smith *v.* London & Southwestern Ry. Co., L. R. 6 C. P. 14; Isham *v.* Dow's Estate, 70 Vt. 588, 41 Atl. 585. See Christianson *v.* Chicago, etc. Ry. Co., 67 Minn. 94, 96, 69 N. W. 640, 641; and Judge Smith's article, "Legal Cause in Actions of Tort," in 25 HARV. L. REV. 103, 114, 223, 303.

[14] State *v.* O'Brien, 81 Iowa 88, 46 N. W. 752; McCahill *v.* New York Transportation Co., 201 N. Y. 221, 94 N. E. 616, and the cases collected in 16 L. R. A. 268.

[15] See the cases cited in note 1 as under the principal Massachusetts case, especially Clover, Clayton & Co., Ltd. *v.* Hughes, [1910] A. C. 242.

[16] This is taking the facts of the case most unfavorably to the petitioner. See note 1, *supra*. If it was a jolt of the hack that threw him from the box, the case is very easy.

[1] See Hutcheson *v.* Grubbs, 80 Va. 251, 254; PRIDEAUX, LAW OF JUDGMENTS 4 ed., 1; 1 BLACK ON JUDGMENTS, 2 ed., § 397.